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DEPARTMENT OF TRANSPORTATION

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OFFICE OF THE
CHIEF COUNSEL
RULES DOCKET

DOCKET SECTION INTERNATIONAL CIVIL AVIATION ORGANIZATION

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**COMMENTS OF THE
INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)
ON THE NOTICE OF PROPOSED RULEMAKING
RELATING TO DOCKET NO. FAA-1998-4758 - 15**

At the first meeting of its 156th Session on 5 February 1999, the Council of ICAO **considered** the legal and technical aspects of the Notice of Proposed Rulemaking (NPRM) published by the United States Federal Aviation Administration (FAA) on 23 November 1998 concerning the "Hatch Amendment" to the 1996 **Antiterrorism** and **Effective** Death Penalty Act of the United States.

As a result of its deliberations, the Council **determined** the ICAO position relating to the aforementioned matter and has adopted a Resolution, the text of which is attached hereto.

The Council noted that the NPRM does not indicate exactly what is meant by "identical" measures, nor explains how it would differ in substance from the current regime. Where foreign government authorities perform the security functions on the carrier's behalf, the proposal would permit the carrier to refer the FAA to that government authority, however, it does not specify action to be taken afterwards. The "Hatch Amendment" and the proposed rule clearly leave the way open for unilateral security requirements to be imposed and unilateral changes to be made to the United States' security requirements **after** the law has entered into force.

The Council, when considering the NPRM, recalled the well-established rule of international **law** reiterated in Article 1 of the Convention on International Civil Aviation (the "Chicago Convention"), that every State has complete and exclusive sovereignty over the airspace above its territory. In line with this provision, Article 11 states that:

"Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing **from** or while within the territory of that State."

However, Article 11 is subject to the other provisions of the Convention and is limited in its scope and application by these other provisions. Accordingly, provided that the other provisions of the Chicago Convention are complied with, it is acknowledged that a State has a sovereign right to impose certain conditions, including security requirements upon a foreign aircraft entering or departing from its territory, or while such aircraft is within its territory. It should be noted that the condition and consistency of such national laws and regulations relating to admission, as set out in Article 11 of the Convention, reflect the principle that the national legislation of a State should be fully compatible with its international obligations, including those found in the Chicago Convention.

Under Article 37 of the Convention, each Contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures and organization; and to this end, ICAO has been empowered to adopt Standards and Recommended Practices (**SARPs**). In line with their undertaking given

through the Chicago Convention, Contracting States should avoid promulgating or enforcing **rules and regulations** which are more exacting or different **from the SARPs contained in the Annexes to the Chicago Convention, including Annex 17**, as this would negatively **impact on the undertaking to secure uniformity**. Should a change in the content or implementation of the **SARPs** be **deemed desirable by a particular State**, it should effect such change through the agreed multilateral forum, namely, ICAO. **Assembly Resolution A32-22 reaffirms the important role of ICAO in facilitating the resolution of questions which may arise between Contracting States in relation to matters affecting the safe and orderly operation of international civil aviation throughout the world,**

The rationale behind the uniformity aspect of Article 37 of the Chicago Convention and the desirability of achieving such uniformity through the Chicago system is clear if one considers the chaos which could potentially result if States require foreign aircraft flying to their territory to comply with their own national security provisions where these differ from Annex 17. Bearing in mind that the State of departure in the exercise of its sovereignty would also have security provisions to be adhered to by aircraft leaving its territory, this could lead to a situation where the operator would have to comply with **different** and possibly conflicting security provisions when these **differ from Annex 17**. The Council recognizes that the possibility of such conflict lessens or disappears when the requirements of all States concerned are in accordance with Annex 17.

Furthermore, pursuant to Article 38 **of the** Chicago Convention and a Council decision of 21 November 1950, a State should report and file a difference with ICAO when its **national** regulations **affect** the operation of aircraft of other Contracting States in and above its territory:

- a) by imposing an obligation within the scope of an Annex which is not covered by an ICAO Standard;
- b) by imposing an obligation different in character **from** that of the corresponding ICAO Standard; and
- c) by being more exacting than the corresponding ICAO Standard.

ICAO is deeply concerned about the extraterritorial aspects of the Act and the proposed amendment to the Regulations, since it will require action in the State of last departure to the United States which could conflict with the laws and regulations which such States of departure, in the exercise of their sovereignty, are entitled to promulgate **and** to enforce.

It is accepted that the degree of protective security applied to international air operations should be commensurate with the level of threat in order to manage risk effectively. As the NPRM acknowledges, there are situations when an increased threat indicates a need for additional measures; in such circumstances it is envisaged that the FAA will impose such a requirement as provided for in Annex 17. However, the Act requires the FAA to take a line which is inconsistent with the principles of risk management. For example, by requiring the FAA to impose identical measures on foreign carriers, the Act removes all discretion as to how risks are to be managed, by both the FAA and, indirectly, by the authorities of foreign States. There are different approaches to security which can be equally valid. By foreclosing on the possibility of any variation, the Council declares that this would lead to the imposition of inappropriate or inefficient techniques.

Some practical difficulties are envisaged **if** the security measures required under the **NPRM** are to be implemented. For example, one of the measures being considered limits air carriers to accepting baggage only inside the terminal building for flights to the United States **from** foreign last points of departure where United States air carriers also operate. Its implementation would, in a number of cases, require additional terminal capacity necessary to accommodate the checked baggage that is currently handled outside the airport terminal. Whilst such may be achievable for United States carriers, it would be impossible for all carriers. Denial of the off-airport check-in of hold baggage in order to meet the FAA requirement will create major difficulties from a foreign carrier policy and passenger facilitation point of view. The cost of introducing the measures which the implementation of the Act will require would

be extremely high as foreign air carriers will need additional equipment, personnel and training, and foreign **airports** will need additional space to accommodate these requirements.

It will be recalled that Annex 17 — Section 3.2 “International Cooperation”, as well as the Resolution adopted by the Council at the seventh meeting of its 126th Session on 16 February 1989 and Assembly Resolution **A32-22** call on Contracting States, while respecting their sovereignty, to substantially enhance cooperation and coordination between them in order to improve the implementation of existing Standards and Recommended Practices and Procedures relating to aviation security with the view to prevent acts of unlawful interference against international civil aviation. Cooperation in the fight against such acts is accepted as vital by the international community. The unilateral imposition of the security measures such as it is envisaged in the NPRM threatens such cooperation. In this regard, the Council reiterated its request that all Contracting States should enhance cooperation and coordination in relation to aviation security.

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ICAO therefore submits that the development of aviation security on the international level has been accomplished with the full cooperation and support of its 185 Member States. The imposition on foreign air carriers of requirements which differ from or are more exacting than the **SARPs** in Annex 17 (or other Annexes) could seriously damage the multilateral framework within which international civil aviation has developed and operates.

Montreal
18 February 1999

ATTACHMENT

RESOLUTION ADOPTED BY THE COUNCIL
OF THE INTERNATIONAL CIVIL **AVIATION** ORGANIZATION
ON 5 FEBRUARY 1999

The Council of the International Civil Aviation Organization:

Recognizing that all acts of unlawful interference against international civil aviation constitute a grave **offence** in violation of international law;

Mindful of the continuing efforts of Contracting States in the suppression of acts of violence directed against international civil aviation;

Having considered the requirement under the 1996 Antiterrorism and Effective Death Penalty Act of the United States that foreign air carriers in their operations to and from airports in the United States must adhere to the identical security measures that the United States requires its air carriers serving the same airports to adhere to;

Having further considered the proposed amendment to Part 129.25(e) of Title 14 of the Code of Federal Regulations of the United States to implement the aforementioned provision of the Antiterrorism and Effective Death Penalty Act;

Recalling that one of the prime objectives of the International Civil Aviation Organization is to meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;

Recalling its Resolution of 16 February 1989 in which it calls upon member States, while respecting their sovereignty, to substantially enhance cooperation and coordination between them in order to improve the implementation of ICAO Standards, Recommended Practices and Procedures;

Drawing particular attention to Assembly Resolution **A32-22** by which the Assembly, *inter alia*, **reaffirms** the important role of ICAO to facilitate the resolution of questions which may arise between Contracting States in relation to matters affecting the safe and orderly operation of international civil aviation throughout the world;

Considering that in accordance with Article 37 of the Convention on International Civil Aviation ("the Chicago Convention"), each Contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations and practices in all matters in which such uniformity will facilitate and improve air navigation;

Recalling that, in accordance with Standard 3.1.5 of Annex 17 to the Chicago Convention, each Contracting State shall keep under constant review the level of threat within its territory taking into account the international situation and adjust relevant elements of its national civil aviation security programme accordingly;

1. *Decides* that the aforementioned provisions of the Antiterrorism and Effective Death Penalty Act of the United States and the proposed amendment to the Code of Federal Regulations **infringe basic principles** of the Chicago Convention, and run counter to the spirit of **multilateralism contained** in such Convention;

violates the Convention

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2. *Expresses its* deep concern about the **extraterritorial** aspects of the Act and **the proposed** amendment to the Regulations, since they will require action in the States of last departure **to** the United States which could conflict with the laws and regulations which such States of **departure**, in the exercise of their sovereignty, are entitled to promulgate and to enforce;
3. *Notes* with deep concern the immense difficulties which would be placed on airlines should they be required to comply with the security requirements of both the State of departure and the State of arrival where these differ from the provisions of Annex 17 to the Chicago Convention;
4. *Declares* that the action **of the** United States would lead to the imposition of **inappropriate and** inefficient techniques in the management of aviation security risks;
5. *Declares* that such action by the United States would negatively impact on passenger facilitation;
6. *Declares further* that the imposition on foreign air carriers of requirements which differ from or are more exacting than the Standards and Recommended Practices in Annex 17 would seriously damage the multilateral **framework** of the Chicago System within which the security of international civil aviation has developed and continues to develop;
7. *Urges* all States to ensure that any action which they may take in the realm of international civil aviation should be compatible with the Chicago Convention, and with the technical provisions developed and adopted within the framework of the Organization;
8. *Requests* Contracting States to refrain **from** imposing their own aviation security provisions unilaterally upon foreign airlines even if they believe that the technical provisions adopted by the Organization are either insufficient or are not being properly implemented;
9. *Calls upon* each Contracting State to utilize the multilateral **mechanism** of ICAO where it believes that changes to the content or level of implementation of **the** Standards and Recommended Practices in the **Annexes** to the Chicago Convention are necessary or desirable;
10. *Reaffirms* the necessity for cooperation and coordination among States in matters of aviation security, which has contributed to the notable success in this area.

- END -

Does this violate.